Supreme Court, U.S.
FILED
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95-437

NO._____

IN THE

UNITED STATES SUPREME COURT

TERM: 1995-1996

HARRY THOMAS,
EDWARD J. THOMAS and
ROBERT D. THOMAS,

Petitioners,

v.

THE UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE,
DIRECTOR OF APPEALS, IRS,
JOHN O. HUMMEL, CAROL A. B.
RUDDER, DAN SAKSEFSKI, and
GARY R. PRINCE,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Pro se:

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EDWARD J. THOMAS
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28 pp

QUESTIONS PRESENTED FOR REVIEW

1. Can the Internal Revenue Service lawfully proceed to enforce collection of additional assessments levied as a result of unagreed-to audit findings from a person without first providing that person his constitutional right to discuss and debate the issues in a due process of law hearing?

2. Do the petitioners have the same right to a due process of law hearing before being deprived of property as was granted to convicted drug criminal Daniel Good by the Supreme Court in United States v. Good Real Property (1993) 126 L Ed 490?

3. Does the suppression of said rights to discuss and debate the unagreed-to audit findings in a due process of law hearing by an IRS employee constitute a viclation of a taxpayers's constitutional rights as was the case in Bivens v. Six Unknown Federal Narcotics Agents (1993) 126 L Ed 490?

OPINIONS AND ORDERS TO BE REVIEWED

U.S. Court of Appeals for the 6th Circuit Order, May 3, 1995, Appendix B1.

U.S. District Court opinion and order, September 22, 1994, Appendix C1.

U.S. District Court Judgment, September 22, 1994, Appendix D1.

A petition for a rehearing was timely filed with the 6th Circuit Court of Appeals. An order denying the petition was rendered by the court on July 7, 1995, Appendix A1.

Jurisdiction to review a judgment or decree of the 6th Circuit Court of Appeals in this case is conferred on this court by 28 USC 1254(1). Jurisdiction of the District Court was conferred mainly by 28 USC 1346 (a)(1) and 26 USC 7433.

This case involves the due process clause of the 5th Amendment to the U.S. Constitution, to wit:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law;"

STATEMENT OF THE CASE

As a result of an IRS audit of the petitioners' 1986-1988 1040 tax returns

petitioners were assessed an additional amount, comprising disallowances of expenses, penalties and interest.

The petitioners filed timely appeals against the IRS decision protesting the disallowances of expenses and penalties. These appeals were directed against the decision of the IRS District Director, John O. Hummel. The appeals were directed to the IRS Appeals Office which is independent of the District Director.

The District Director, the appellee in the case, deliberately intercepted the appeal papers and subsequently judged them to be "inadequate". He then closed the case and issued final bills of deficiencies. The petitioners had no other recourse but to pay the unlawfully assessed bills on September 21, 1992 and thus were deprived of property without due process of law.

ARGUMENT

The action of respondents John O. Hummel et al. in intercepting and judging the appeals directed to the IRS Appeals Office violated the Constitutional rights of the petitioners to due process of law.

The petitioners, as taxpayers, have as much right to due process before being deprived of property as did convicted drug criminal Daniel Good in United States v. Good Real Property (1993) 126 L Ed 2d 490.

Respectfully,

Harry Thomas
HARRY THOMAS
Petitioner, pro se

Edward J. Thomas
EDWARD J. THOMAS
Petitioner, pro se

Robert D. Thomas
ROBERT D. THOMAS
Petitioner, pro se

APPENDIX

Petition for Rehearing - 6th Circuit Court of Appeals . . . . . A

U.S. Court of Appeals for the 6th Circuit Order, May 3, 1995. . . . . B

U.S. District Court Opinion and Order, September 22, 1994 C

U.S. District Court Judgment, September 22, 1994 . . . . . D

No. 94-2358

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed 7/7/95

HARRY THOMAS, ET AL.,

Plaintiffs-Appellants,

v. ORDER

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellees.

BEFORE: KENNEDY AND SUHRHEINRICH, Circuit Judges; and *HILLMAN, District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

(Signed)
LEONARD GREEN, CLERK

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*Hon, Douglas W. Hillman Senior United States District Judge for the Western District of Michigan, sitting by designation.

NO. 942358

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed
May 3, 1995

HARRY THOMAS, EDWARD J. THOMAS, and ROBERT D. THOMAS.

Plaintiffs-Appellants,

v.

ORDER

UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, et al,

Defendants Appellees.

BEFORE: KENNEDY AND SUHRHEINRICH, Circuit Judges; and Hillman, District Judge.*

Harry Thomas, EdWARD J. Thomas, and Robert D. Thomas, pro se Michigan residents, appeal a district court judgment dismissing their civil complaints seeking a tax refund pursuant to 26 U.S.C. 7422 and damages under 26 U.S.C. 7433. The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary relief, each plaintiff sued the United States, the IRS, and multiple IRS agents, contending that they were

entitled to a tax refund. Plaintiffs also alleged that the defendants violated the plaintiffs' rights under 26 U.S.C. 7433 by not providing them a hearing as set forth in an IRS publication. The cases were consolidated by the district court. The defendants moved to dismiss the case for lack of jurisdiction under Fed. R. Civ. P. 12 (b)(1). Plaintiffs opposed defendants' motion to dismiss. Subsequently, the discourt granted defendants' motion to dismiss under Rules 12(b)(1) and 12(b)(6).

In their timely appeal, plaintiffs argue that the district court erred by dismissing their: 1) claims for a refund; 2) allegations against the individual IRS employees; and 3) request for damages under para. 7433. Finally, plaintiffs contend that the district court judge was biased.

This court conducts a de novo review of a district court's judgment dismissing a case under Rules 12(b)(1) and 12 (b)(6). Duncan v. Rolm Mil-Spec Computers, 917 F.2d 261,263 (6th Cir. 1990)(Rule 12(b)(1); Meador v. Cabinet for Human Resources, 902 F.2d 474,475 (6th Cir.), cert. denied, 498 U.S. 867 (1990)(Rule 12(b)(6).

The district court properly dismissed plaintiffs' requests for refunds under para. 7422. To obtain a tax refund, a person must file a claim with the Secretary of the Treasury, 26 U.S.C. 7422(a). The claim must set forth the grounds for the refund, 26 C.F.R. 301.6492-1(b). When a party fails

to state with specificity the grounds for the refund, the court is without jurisdidiction to entertain the action. Salyersville Nat'l Bank v. United States, 613 F.2d 650, 651 (6th Cir. 1980). Plaintiffs concede that they did not raise the issue of disallowance of deductions relative to their partnership before the Secretary. As the plaintiffs admittedly failed to specify how they were entitled to a refund, the district court properly found that it lacked jurisdiction to entertain plaintiffs' refund requests. 28 U.S.C. 7422(a), Salyersville Nat'l Bank, 613 F.2d at 651.

Plaintiffs argue that IRS Publication 5 creates a due process right to a hearing. However, an internal IRS policy or publication creates no rights. Rather any due process rights must be created by statute or regulation. See Gonsalves v. IRS, 975 F.2d 1 , 16 (1st Cir. 1992)(per curiam). Although plaintiffs feel that the individual defendants violated Publication 5, as the

publication has no force of law, plaintiffs fail to state a claim against the individual defendants.

Plaintiffs contend that they are entitled to damages under para. 7433 because Publication 5 was violated. As we previously noted Publication 5 has no force of law and, therefore, no claim under para. 7433 was stated. Finally, plaintiffs assert that the district judge was biased. Examination of the stated basis for that allegation reveals that plaintiffs merely disagree with the distrct judge's decisions regarding applicable law. United States v. Story, 716 F.2d 1088,1090 (6th Cir. 1983).

Accordingly, we affirm the district courts judgment. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

(Signed)
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HARRY THOMAS,
EDWARD J. THOMAS and
ROBERT D. THOMAS,

Plaintiffs,

v.

UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE,
DIRECTOR OF APPEALS, IRS,
JOHN O. HUMMEL, CAROL A. B.
RUDDER, DAN SAKSEFSKI,
and GARY R. PRINCE,

Defendants.
_____/

CASE NO.
94-CV-70209-DT
94-CV-70672-DT
94-CV-70673-DT
HON. LAWRENCE P.
ZATKOFF

OPINION AND ORDER

I.

This matter is before the Court on defendants' motion of July 1, 1994, to dismiss the Complaints of all three plaintiffs pursuant to Fed R. Civ. P. 12(b)(1), on the grounds that the Court lacks jurisdiction over the actions. Plaintiffs have filed a response brief to which defendants did not reply. This matter is also before the Court on defendants' motion for an additional extension of time to answer outstand-

ing discovery. Plaintiffs filed a response to which defendants did not reply.

Finally, this matter is before the Court on plaintiffs' motions to stay proceedings with respect to Edward J. Thomas and Robert D. Thomas and to join Harry Thomas as plaintiff with Edward J. Thomas and Robert D. Thomas. Defendants filed a response brief to which plaintiffs replied. Finding that oral argument would not significantly advance the decisional process with respect to these motions, this Court will not entertain oral arguments. See E.D. Mich. LR 7.1 (e)(2). For the reasons set forth below, defendants' Motion to Dismiss is granted against all three plaintiffs. Based on that resolution, defendants' motion for additional extension of time to answer and and plaintiffs' motions to join and to stay proceedings are moot and not addressed.

II.

The three plaintiffs are partners in the Thomas Mink Ranch. In February 1989, de-

fendant Gary Prince of the Internal Revenue Service (hereinafter "IRS)", notified the plaintiffs that he was to conduct an audit of the 1986-1988 tax returns for all Thomas Mink Ranch partners. As a result of the 800-day audit, the plaintiffs were found to owe the IRS approximately $128,000 in taxes and penalties. Each Plaintiff has appealed this finding pursuant to IRS Publication 5, filed Administrtative Claims for Refund for 1986-1988, and has paid the deficiency amount against him. Each plaintiff's claim for refund alleges that the tax forms he filed were correctly filled out, that the defendants had erroneously denied him refunds, and that defendants had violated plaintiff's due process rights.

Plaintiffs have since brought individual actions against the United States and several IRS agents and employees involved in conducting an audit of their respective tax liabilities for the tax years 1986-1988 and the processing of their attempted appeals of the determination of their tax

liabilities. Their cases have been consoiidated, but not joined, and the motions herein pertain to all three plaintiffs. Plaintiffs seek a refund for taxes they paid pursuant to 26 USC 7422 and additional damages under 26 USC 7433.

III.

Before any suit for a tax refund may be maintained under 26 USC 7422, a plaintiff must file a claim of refund with the Secretary of the Treasury ("Secretary"). See 26 USC 7422(a). The claim has to satisfy the regulations and provisions of law established by the Secretary. Id. One requirement of the Secretary is that the claim for refund must set forth, with specificity, the grounds upon which plaintiff is entitled to a refund. 26 C.F.R. 301.6402-2(b) (301.6402-2(b) of the Treasury Regulations). Para. 301.6402-2(b) provides, in pertinent part, as follows:

> (t)he claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to to apprise the Commissioner thereof.

> The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit.

The purpose of this requirement is to apprise the IRS of the exact nature of the claim, and allow the IRS to investigate whether a refund should issue, thereby resolving the issue at an administrative level rather than through federal court adjudication. See United States v. Felt ad Tarrant co., 283 U.S. 269 (1931); Estate Bird v. United States, 534 F.2d 1212, 1219 (6th Cir. 1976. Where a party does not specifically set forth the grounds for its claim for refund, "(t)he court in a refund is without jurisdiction to consider them." Estate of Bird, 534 F.2d at 1219.

The claims for refund filed by plain tiffs fail to satisfy Treasury Regulation para. 302.6402(b)(1). Plaintiffs' respective claims for refund simply allege that each plaintiff filed correct forms, defen-

dants erroneously computed those forms and deductions, and defendants denied plaintiffs' due process rights when plaintiffs sought to appeal the defendants' computations. However, nowhere in any of the plaintiffs' claims for refunds did plaintiffs state facts upon which they were entitled to refunds or specify how defendants erroneously disallowed plaintiffs' claimed deductions. Although plaintiffs' claims for refund did allege that they were entitled to a refund because they were denied due process of law in having their deductions disallowed, the violation of one's due process on a tax appeal does not entitle that person to a refund.

Plaintiffs concede that they did not raise the issue of the disallowance of deductions relative to the Thomas Mink partnership in their administrative claims for refund, but assert that said omissions are irrelevant to these federal suits. (Plaintiffs' Response to Motion to Dismiss, pg.3).

Contrary to plaintiffs' beliefs, their omissions are significant, and fatal, in these suits. Without allegations of why and how the defendants wrongfully disallowed plaintiffs' deductions, plaintiffs' claims for refund were not duly filed in accordance with 26 U.S.C. 7422(a). Therefore, the Court is required to dismiss the 26 U.S.C. 7422(a) claims for lack of subject matter jurisdiction. Accordingly, the defendant's motion to dismiss Harry Thomas', Edward J. Thomas' and Robert D. Thomas' 26 U.S.C. 7422(a) claims against the United States are granted.

B. PLAINTIFFS' ACTIONS UNDER 26 U.S.C. 7433

In AN Opinion and Order dated July 8, 1994, this Court dismissed plaintiff Harry Thomas' 26 U.S.C. 7433 claim for failure to state a claim upon which relief can be granted. Plaintiffs Edward J. Thomas' and Robert D. Thomas' 26 U.S.C. 7433 claims are now dismissed for the same reasons.

26 U.S.C. 7433 (West 1989), enacted in

1988 as part of the "Taxpayer Bill of Rights", provides in pertinent part as follows:

> (a) If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in para 7432, such action shall be the exclusive remedy for recovering damages resulting from such action.

26 U.S.C. 7433(a). Plaintiffs state that their rights to due process of the law under IRS Publication 5 were violated by the individual defendants. (Plaintiffs' Response to Motion to Dismiss, pg. 6).

As to defendants' motion to dismiss the IRS, the Director of Appeals, IRS, John O. Hummel, Carol A. B. Rudder, Dan Saksefski, and Gary R. Prince from plaintiffs' 26 U.S.C. 7433 claims, this motion must be granted. Section 7433(a) expressly provides that civil suit may be maintained "for damages against the United States." Id.

Therefore, only the United States is a proper party for such a claim.

In addition, the United States argues that para. 7433 relates exclusively to the collection of taxes and not to the determination of taxes.[1/] The United States argues that this case only involves the determination of plaintiffs' tax obligation, and thus their claims under para. 7433 fail to state a claim upon which relief can be granted. Plaintiffs contend that the collection phase begins with the first presentation of a notice or bill of deficiencies by the examiner; which in this case occurred when Gary Prince presented such notice at the end of his audit of plaintiffs Edward J. and Robert D. Thomas. This Court need not decide when the collection phase of the tax proceeding begins, because this Court finds that plaintiffs Edward J. and Robert D. Thomas have failed to state a claim upon which relief can be granted on a different ground.

As noted above, plaintiffs Edward J. and Robert D. Thomas' causes of action under para. 7433 are predicated solely on the appeals phase "as governed by IRS Publication 5." In Gonsalves v. I.R.S., 975 F.2d 13 (1st Cir. 1992,), the United States Court of Appeals for the first Circuit stated:

> Because the statute (26 U.S.C. 7433) authorizes suits only where an IRS agent has violated the taxing statutes or the regulations promulgated under them, Mr. Gonsalves cannot recover from the government for the alleged denial of his appeal rights.2/ These "rights," as Mr. Gonsalves acknowledges, were created not by statute or regulation, but by internal IRS policy as reflected in publications disseminated to taxpayers. The government has not consented to suit for violations of rights created in this manner. Therefore, whether or not the the courts may have a duty to enforce the rights at issue in appropriate circumstances and by appropriate methods . . . they have no power to do so by assessing liability for money damages against the United States.

Id. at 16 (citations omitted).

This Court is persuaded that the First Circuit was correct in its interpretation of para, 7433. Consequently, plaintiffs Edward J. and Robert D. Thomas cannot base a claim upon an alleged violation of IRS

Publication 5 under para. 7433. Therefore, this Court finds that plaintiffs Edward J. Thomas and Robert D. Thomas have failed to state a claim under para. 7433 based on alleged violations of IRS Publication 5. Thus, defendants' motion to dismiss plaintiffs Edward J. Thomas' and Robert D. Thomas' claims as they related to 26 U.S.C. 7433 are granted.

IV.

For the reasons stated above, IT IS ORDERED that plaintiffs Harry Thomas', Edward J. Thomas', and Robert D. Thomas' respective Complaints against all named defendants are DISMISSED.

Accordingly, defendants' motion for an additional extension of time to answer discovery and plaintiffs' motions to join and to stay proceedings are rendered moot.

IT IS SO ORDERED.

(Signed)
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Dated: September 22, 1994

1/ This Court will construe this part of defendant United States' motion as a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. A motion brought pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted requires this Court to determine whether plaintiff Harry Thomas has pleaded a cognizable claim under para. 7433. This Court must accept as true all factual allegations in the complaint, and the motion must be denied unless it appears beyond doubt that the non-moving party cannot prove a set of facts which would permit relief. Housing Opportunities Made Equal, Inc. v. The Cincinnati Enquirer, 943 F.2d 644, 645 (6th Cir. 1991); Windsor v. The Tennessean, 719 F.2d 155, 158 (6th Cir.1983), cert. denied, 469 U.S. 826 (1984).

2/ Like plaintiffs Edward J. and Robert D. Thomas, the plaintiff in Gonsalves also relied on appeal rights as stated in IRS Publication 5. See Gonsalves v. United States, 782 F.Supp. 164, 169-70 (D.Me.), aff'd, Gonsalves v. I.R.S., 975 F.2d 13 (1st Cir. 1992). The plaintiff in Gonsalves also relied on IRS Publication 1. Gonsalves, 782 F.Supp. at 169.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HARRY THOMAS,
EDWARD J. THOMAS, and
ROBERT D. THOMAS,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE,
DIRECTOR OF APPEALS, IRS,
JOHN O. HUMMEL, CAROL A. B.
RUDDER, DAN SAKSEFSKI,
and GARY R. PRINCE,

Defendants.
_____/

CASE NO.
94-CV-70209-DT
94-CV-70672-DT
94-CV-70673-DT

HON. LAWRENCE P.
ZATKOFF

J U D G M E N T

IT IS ORDERED AND ADJUDGED that this action is hereby DISMISSED pursuant to the Opinion and Order dated September 22, 1994.

Dated at Detroit, Michigan, this 22nd day of September, 1994.

JOHN P. MAYER
CLERK OF THE COURT

BY: (Signed)

APPROVED:

(Signed)
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE